Supreme Court, U.S.
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No.: 87-891

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN FRIEDRICH

Petitioner

VS.

THE STATE OF OHIO

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO

BRIEF IN OPPOSITION

COUNSEL FOR RESPONDENT:

Thomas D. White, Prosecuting Attorney
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STATEMENT OF THE CASE

Holmes County is a rural, agricultural county in east central Ohio. Its population numbers 30,000, approximately forty percent of whom are members of the Amish sect. The local bar numbers eighteen practitioners, including a part-time prosecuting attorney and two part-time assistant prosecuting attorneys.

On April 8, 1986, the Holmes County, Ohio, Grand Jury returned a true bill of indictment against Defendant/Petitioner (hereinafter, Defendant) John Friedrich, charging him with the aggravated murder of G. Gayle Meggyesy on March 29, 1986.

On August 7, 1986, counsel for Defendant filed a motion to disqualify the Prosecuting Attorney, the motion being predicated upon the claimed attorney-client relationship between the Defendant and Prosecuting Attorney White. The alleged relationship stemmed from a limited consultation eighteen months earlier between the Defendant and Mr. White, who maintained a private practice in order to supplement his income from his part-time Prosecutor's responsibilities. The consultation, which lasted for several minutes, concerned a Worker's Compensation claim Defendant wished to pursue. Mr. White did not accept the matter for Defendant.

On November 6, 1986, the trial court overruled the motion for disqualification of counsel, finding the claimed attorney-client relationship too attenuated to stand up to scrutiny.

On November 7, 1986, counsel for Defendant filed a Notice of Appeal to the Court of Appeals for Holmes County, Ohio, Fifth Appellate District, on the issue of the trial court's overruling of the disqualification motion.

On November 13, 1986, the trial court journalized an entry continuing the trial until such time as the Court of Appeals ruled on the appeal.

On April 17, 1987, the Court of Appeals filed its opinion dismissing Defendant's appeal ". . . for want of jurisdiction as there is no final appealable order".

On May 1, 1987, counsel for Defendant filed a Notice of Appeal to the Supreme Court of Ohio on the issue of the dismissal by the Court of Appeals.

On May 8, 1987, the trial judge notified counsel of record by letter of his opinion that the process of appeal would toll speedy trial time. His opinion was not challenged by either the State of Ohio or the defense.

On August 5, 1987, the Supreme Court of Ohio summarily overruled Defendant's motion for leave to appeal the dismissal by the Court of Appeals.

On September 1, 1987, counsel for Defendant filed a Notice of Appeal to the United States Supreme Court on the issue of the dismissal by the Court of Appeals.

As of the date of filing of this brief, Defendant is yet to be tried for the murder of G. Gayle Meggyesy.

ARGUMENT

I. INTRODUCTION

Defendant/Petitioner (hereinafter, Defendant) brings his Petition for a Writ of Certiorari pursuant to 28 U.S.C. §1257, which provides, in part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

By definition, a petition must have (1) a final judgment (2) from the highest court of a state (3) which presents a federal question. While it is undisputed that Defendant now seeks Supreme Court review after summary disposition by the highest court of the State of Ohio, he neither has a final judgment nor does he present a federal question. In fact, his petition seeks review of an issue which has previously been resolved by the Supreme Court of Ohio. Hence, his petition should be dismissed.

II. DEFENDANT/PETITIONER HAS NO FINAL JUDGMENT

According to Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* §4009, a final judgment is one that:

> terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. * * * Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. * * * Nothing is left to the judicial discretion of the court below.[1]

In determining whether a judgment meets this criteria the Supreme Court may review the record below to assess the finality of proceedings. It may also look to state law for guidance on the issue of finality. See Wright, Miller, Cooper & Gressman, supra.

Defendant in the instant case makes no secret of the fact that this appeal is of a pre-trial motion to disqualify the Prosecuting Attorney. In fact, the underlying prosecution has not yet been docketed for trial, owing to the trial court's deference to defense counsel's propensity for further appeal. Hence, there can be no argument that the record below does not reflect a final judgment, and that numerous issues remain to be resolved, not the least of which is that of Defendant's guilt or innocence.

As to state law, the Supreme Court of Ohio has spoken to the very issue Defendant now attempts to raise. In *Bernbaum v. Silverstein*[2] the Court addressed the issue of whether an order overruling a motion to disqualify counsel is a final order, subject to appeal. In a unanimous decision the Court held that such an order was not a final order within the meaning of OHIO REV.

CODE ANN. §2505.02 (Page), and thus not appealable. The Court reasoned that such an order did not implicate a claim of right which would be irreparably lost if review was deferred until after final judgment. Interestingly, the author of the opinion, Justice Sweeney, noted in dictum that appeals of motions to disqualify counsel often are used as devices to delay final determination on the merits, an observation which is particularly relevant to the instant case.

An analagous situation may be found in this Court's opinion in *Flanagan v. United States*[3], in which this Court held that a district court's pre-trial disqualification of defense counsel in a criminal prosecution was not an order subject to immediate appeal. The opinion stressed the policy reasons underlying the final judgment rule, which encourage efficient administration of justice while discouraging piecemeal review. Such policy, this Court concluded, is at its strongest in the field of criminal law.

Viewed in light of the traditional finality definition, it is clear that Defendant's petition does not present this Court with a judgment which terminated the litigation below. Far from it. It merely seeks to raise a pre-trial issue which could more efficiently be raised in the context of an appeal following judgment on the merits, if, in fact, such appeal becomes necessary.

III. DEFENDANT/PETITIONER RAISES NO FEDERAL QUESTION

The jurisdiction of the Supreme Court in reviewing the proceedings of a state court is not that of a general reviewing court, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin specially set up in the state court, and denied by the rulings and judgment of that Court.[4] In short, review is limited to cases which present a federal question, whether in the context of the alleged invalidity of a United States statute or treaty; or in the context of the alleged invalidity of a state statute as being repugnant to federal law; or in the context of a claimed title, right, privilege or immunity which exists under federal law. See 28 U.S.C. §1257(3). As summarized in Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* §4017:

> Jurisdiction is available whenever there is a not insubstantial claim that any variety of federal law applies to require a result different than that reached by the state courts.

A close examination of Defendant's Petition for Writ of Certiorari reveals the following:

(1) No mention of a federal question is raised under the section titled "Questions Presented for Review".

(2) No mention of a federal question is raised under the section titled "Statement of the Case".

(3) No mention of a federal question is raised under the section titled "Reasons to Grant the Writ of Certiorari".

(4) The appendices to the petition are devoid of any argument or authority on the existence of a federal question.

(5) One vague reference is made to a federal question under the section titled "Conclusion", but the reference was neither argued in the text of the petition nor supported by even one citation of authority.

Simply put, Defendant seeks to invoke the jurisdiction of this Court to engage in a general review of one pretrial issue which he has neither characterized nor briefed as a federal question. In fact, he did not treat the issue below as a federal question. He cannot now expect to use one vague reference to certain Constitutional rights in order to bring his petition into conformity with this Court's threshhold requirements for review. Accordingly, he fails to raise a federal question.

IV. THE STATE COURT'S DECISION IS SUPPORTED BY AN INDEPENDENT AND ADEQUATE GROUND OF STATE LAW

As a rule, the Supreme Court will not review a federal question if the state court's judgment is supported by an independent and adequate ground of state law. Review may be precluded if state substantive law is sufficient to support the judgment, no matter how the federal question is resolved, or if the state courts have found adequate procedural reasons for refusing to decide the federal question. Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* §4019.

The decision of the Court of Appeals for Holmes County, Ohio, Fifth Appellate District (Appendix A-4 of Defendant's petition) addresses both the substantive and procedural issues. That Court analyzed Defendant's argument in light of applicable state statutes and case law. The controlling decision of the Supreme Court of Ohio in *Bernbaum v. Silverstein*[5] turned, in part, on that Court's analysis of Ohio Revised Code Section 2505.02, Final Order, which provides:

> An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.
>
> When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

The Supreme Court of Ohio, in *Bernbaum*, supra, found that an order overruling a motion to disqualify counsel was not a final appealable order within the meaning of the statute. The Court reasoned that error, if it existed, could be reviewed more efficiently after final judgment. The Court also found instructive the conclusion of the author in *Comments, The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Court,*[6] that allegations of disclosures because of a prior attorney-client relationship are no more curable by immediate appeal than by appeal after final judgment because of the likelihood that the challenged attorney will have had ample opportunity to disclose all that he knows prior to any disqualification.

Accordingly, there is no prejudice to Defendant by requiring him to raise after final judgment any claimed error regarding disqualification of counsel.

V. THE FEDERAL COUNTERPART TO THE STATE LAW DECISION WOULD DICTATE THE SAME RESULT

The Court of Appeals of Holmes County, Ohio, Fifth Appellate District, dismissed Defendant's appeal for want of jurisdiction as there was no final appealable order. This decision was grounded upon Ohio statutory and case law.

The same holding, however, would likely result if the analysis were based upon federal statutory and case law. As the State of Ohio has already argued, this Court's holding in *Flanagan v. United States*[7] emphasized the importance of the final judgment rule, even as to the issue of the pre-trial disqualification of counsel in a criminal prosecution. By the same token, this Court's holding in *Richardson-Merrell, Inc. v. Koller*[8] stands for the proposition that an order disqualifying counsel in a civil case is also not a final judgment subject to immediate appeal. In the latter case this Court held that the propriety of a disqualification order in a civil case can be reviewed as effectively on appeal of a final judgment as on interlocutory appeal, thus serving the final judgment policy. Furthermore, where prejudice is a prerequisite to reversal, the disqualification order is not sufficiently separate from the merits of the case to qualify for interlocutory appeal (citing *Flanagan,* supra).

The instant case involves an order overruling a motion to disqualify counsel in a criminal proceeding. By employing the foregoing analysis it can be reasoned that whatever prejudice Defendant may claim as a result of his failed attempt at disqualifying the Prosecuting Attorney can and should be raised in an appeal following final judgment. To do otherwise is to invite the sort of delay and ineffectiveness which is the unfortunate hallmark of the instant case.

VI. CONCLUSION

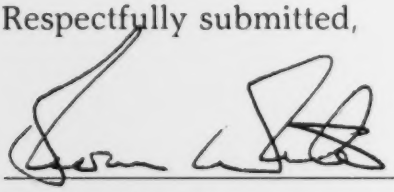
Defendant's petition is based upon the trial court's order overruling his pre-trial motion to disqualify the Prosecuting Attorney in this criminal prosecution. The motion from which he appeals was one of several pre-trial motions (Appendix A-11 of Defendant's petition), some of which have yet to be decided. To adopt Defendant's position would be to invite further appeal on other pre-trial matters, a result which is not favored under either federal or state law.

The statute invoked by Defendant in seeking this review provides the fabric for disposition of his petition. He has no final judgment upon which to base his appeal. Neither has he presented this or any other reviewing court with a federal question. However, assuming, arguendo, that this Court were to find both elements, the State of Ohio has provided adequate state law grounds upon which to rest the decision of the state court. Nor would the result be different if decided according to federal standards for review.

Defendant's action in pursuing his Petition for a Writ of Certiorari should be seen for what it really is: a device to delay final determination on the merits.

For the foregoing reasons, the State of Ohio urges this Court to overrule and dismiss Defendant's petition.

Respectfully submitted,



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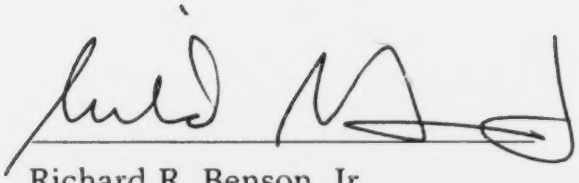

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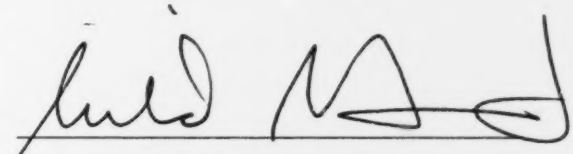
FOOTNOTES

1. Citing *Mower v. Fletcher,* 114 U.S. 127, 128, 5 S.Ct. 799, 29 L. Ed. 117
2. 62 Ohio St 2d 445, 406 N.E. 2d 532 (1980)
3. 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed. 2d 288 (1984)
4. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417 (1909)
5. See Footnote 2
6. 45 Univ. of Chicago L. Rev. 450
7. See Footnote 3
8. 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed. 2d 340 (1985)

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition were served personally upon Ralph C. Buss, Attorney for Defendant/Petitioner, by handing them to him at the Holmes County Courthouse, Millersburg, Ohio 44654, on this 29th day of January, 1988.



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